No. 89-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEAT MARWICK MAIN & COMPANY,
Petitioner,

v.

PHILIP D. ROBERTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF LOMAS MORTGAGE U.S.A., INC.
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether a truthful statement that a professional services provider has agreed to perform future services contained in an allegedly misleading offering memorandum, coupled with a conclusory allegation that the professional services provider knew of alleged misstatements in the memorandum, creates a duty to disclose on the part of the professional services provider sufficient to render its silence as to the alleged misstatements actionable as aiding and abetting under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Lomas Mortgage U.S.A., Inc. ("Lomas") is recognized as a premier provider of mortgage servicing, with offices in several states and a mortgage servicing portfolio that extends nationwide.[1] For a national economy to function effectively, federal securities laws must be interpreted in a

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Petitioner's letter of consent has been filed with the Clerk of the Court. Respondents have granted verbal consent but were not able to supply written consent prior to this Brief's filing because of the earthquake in San Francisco. Pursuant to advice of the Clerk of the Court, Respondents' written consent will be filed with the Court immediately upon its receipt.

consistent manner. Lomas has, as a consequence of its nationwide presence, a keen interest in the uniform and reasoned development of the laws under which mortgage banking companies must operate. Because of this interest, Lomas brings to the Court's attention the substantial danger in which the decision below places reasoned development of the nation's securities laws.

In connection with a variety of financing transactions, including securities offerings, the underlying security for the capital raised is pooled mortgages. Whenever this is the case, a professional mortgage servicing company is needed to efficiently and effectively service the pool of mortgages. Lomas performs this service, and is described in offering documents as having agreed to provide such services in the future. If the decision below stands, Lomas and other mortgage servicing companies will be subject to the great expense of defending serious and costly litigation simply because such professional services providers are identified in allegedly fraudulent offering materials as agreeing to undertake mortgage servicing responsibilities. Participation by such companies may become impractical or require such drastically increased fees as to impair the feasibility of such transactions. Particularly in light of the proliferation of the security transaction as an important financing tool for governmental bodies as well as private concerns, the potential adverse impact of the decision below is highly significant.

Lomas's participation in this proceeding evidences the far-reaching practical impact of the decision below. Although the decision below dealt explicitly with accountants and attorneys, the opinion has dramatic effects on all professional services providers, including mortgage servicing companies, banks, geologists, private mortgage insurance companies and other companies providing various forms of insurance, and financial entities serving as trustees. Inconsistent standards among judicial circuits on the issues presented in this case could, as a

practical matter, impair innumerable commercial transactions. The purpose of this brief is to provide an understanding of the nature of the effects of the decision below on the national commercial marketplace and explain why, in the view of Lomas, the legal questions raised by the decision below are critical enough to warrant review by the Court.

STATEMENT

In this case, the United States Court of Appeals for the Ninth Circuit held that the truthful statement that a professional had agreed to provide services in the future contained in an allegedly misleading offering memorandum, combined with conclusory allegations that the firm knew of alleged misstatements in the memorandum, creates a duty to disclose on the part of the professional sufficient to make its silence actionable under Section 10(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78j(b) (1982) ("Section 10(b)") and Rule 10b-5 of the Securities Exchange Commission (the "SEC"), 17 C.F.R. § 240.10b-5 (1988) ("Rule 10b-5"). *Roberts v. Peat Marwick Mitchell & Co.*, 857 F.2d 646 (9th Cir. 1988), *rev'g Roberts v. Heim*, 670 F. Supp. 1466 (N.D. Cal. 1987).

The allegedly fraudulent offering memorandum mentioned Peat Marwick only once, in an indisputably true statement that Peat Marwick "has agreed to perform accounting services for the Partnership, including the preparation of tax returns and audited financial statements." The complaint alleged that "the investors relied on Peat, Marwick's reputation when deciding to invest" and "they would not have invested had Peat, Marwick disclosed the alleged fraud." *Id.* at 653 (Pet. 15a). On that basis, the decision below stated:

> These facts may be sufficient to create a duty to disclose in Peat, Marwick. Investors can reasonably be expected to assume that an accounting firm would not consent to the

> use of its name on reports and offering memoranda it knew were fraudulent. Thus, it may be reasonable to expect an accountant to disclose fraud in this type of situation where the accountant's information is superior and the cost to the accountant of disclosure is minimal.

Id. at 653 (Pet. 14a). The Ninth Circuit also considered functionally parallel allegations concerning the conduct of another professional services provider, the law firm of Houston Harbaugh, which had rendered title opinions included within the offering memorandum. Unlike its opinion as to the accounting firm, the decision below affirmed summary judgment for the law firm:

> Unlike the allegations with respect to Peat, Marwick, no duty with respect to Houston Harbaugh could possibly be established by the facts alleged in the complaint . . . Even if the facts alleged are true, Houston Harbaugh's duty cannot extend to disclosing the information the investors wanted when it was hired only to determine marketability of title. Otherwise, a party could be liable for unlimited information even though it would be well beyond the matter for which it was retained.

Id. at 654 (Pet. 15a-16a). The decision below also affirmed, without discussion, the district court's dismissal of claims against technology consultants in enhanced oil recovery, on the basis that the "mere provision of information" and expertise to a primary violator in the absence of allegations explaining how the experts caused the fraud was insufficient to state a claim. *See Roberts*, 670 F. Supp. at 1483.

The Ninth Circuit denied a petition for rehearing and suggestion for rehearing *en banc* without opinion (Pet. 18a).

REASONS FOR GRANTING THE PETITION

The subject Petition presents issues that are extraordinarily ripe for this Court's review. Despite the total absence of an explicit basis for a private action for aiding and abetting under either Section 10(b) or Rule 10b-5, the Court's reservation of decision concerning whether such an action is permissible,[2] specific congressional intent against such implying such an action,[3] and adequate remedies against such behavior in criminal and administrative enforcement actions,[4] the lower

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[2] The Court has explicitly reserved decision on the questions of "whether civil liability for aiding and abetting is appropriate" and "the elements necessary to establish such a cause of action." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 192 n.7 (1976); *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 379 n.5 (1983).

[3] In 1959, Congress rejected a bill that would have made it unlawful for anyone to aid or abet a violation of the securities laws. *See* H.R. 2480, § 22, 86th Cong., 1st Sess. (1959), *reprinted in Securities Acts Amendments, 1959, Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce on Securities Exchange Comm'n Matters*, 86th Cong., 1st Sess. 89, 93, 170 (1959). The SEC agreed that "no civil liability is intended." *SEC Legislation: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency on S. 1178, S. 1179, S. 1180, S. 1181, and S. 1182*, 86th Cong., 1st Sess. 288, 288, 370 (1959). In 1960, Congress again rejected aiding and abetting legislation. *See* S. 3770, § 20, 86th Cong., 2d Sess., 106 Cong. Rec. 15,613, 15,614 (1960); S. Rep. No. 1757, 86th Cong., 2d Sess. (1960).

[4] The SEC has authority to discipline brokers that aid or abet violations of the securities laws, *see* Act §§ 15(b)(4)(E), 15(b)(1), 15(b)(6) (allowing SEC to revoke registration of brokers), and to discipline investment advisors that aid or abet such violations, *see* Investments Advisers Act, §§ 203(e)(5) and § 209(e), 15 U.S.C. §§ 80b-3(e)(5), 80b-9(e) (1982 & Supp. V 1987). The SEC can deny the right to practice before the Commission to any attorney that has aided or abetted such a violation. *See* 17 C.F.R. § 201.2(e)(1)(iii), (3)(i) (1988). Title 18 of the federal criminal code also criminalizes aiding and abetting of securities violations. *See* 18 U.S.C. § 2(a) (1982), 15 U.S.C. §§ 78ff, 77x (1982 & Supp. V 1987).

federal courts have almost unanimously allowed such private actions under Section 10(b) and Rule 10b-5.[5] With the decision below, the lower courts' exercise in judicial legislation has finally gone awry. The Ninth Circuit has split from the majority by permitting a professional services provider to be held for trial on fraud charges conclusorily drawn from the single truthful disclosure that the professional would provide services to the issuer of securities in the future. The resultant disarray among the circuits, in combination with the flexibility in forum choice accorded plaintiffs in securities fraud actions,[6] threatens to undermine the commercial practicabilities underlying national securities offerings. For the reasons that follow, the Court should review the decision below.

I. The Decision Below Endangers A Consistent Nationwide Functioning Of Federal Securities Laws By Imposing Unprecedented Duties On Professional Services Providers

The federal securities laws present a balance between the goal of promoting equality of information among potential

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[5] Although *amicus* limits itself in this brief to the question of whether the conduct in this case can permissibly constitute aiding and abetting a securities violation, it agrees with Petitioner that the writ should also be granted to resolve the open question of whether aiding and abetting liability is permissible at all in a private action. *Accord*, Bromberg & Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 Albany L. Rev. 637, 773 (1988) (implied action should not be recognized); Fischel, *Secondary Liability Under Section 10(b) of the Securities Exchange Act of 1934*, 69 Calif. L. Rev. 80 (1981) (secondary liability is invalid); Ruder, *Multiple Defendants in Securities Fraud Cases: Aiding and Abetting, Conspiracy, in Pari Delicto, Indemnification and Contribution*, 120 U. Pa. L. Rev. 597, 646 (1972) (chairman of SEC arguing against such liability).

[6] Securities claims are, perhaps uniquely, subject to being instituted in "the widest possible choice of forums." *Somerville v. Major Exploration Inc.*, 576 F. Supp. 902, 908 (S.D.N.Y. 1983).

investors[7] and the equally important goal of not interfering with the "honest business" that permits a market in securities to exist.[8] The decision below endangers this delicate equilibrium by creating new and unprecedented duties of disclosure running from professional services providers to the investing public at large. By creating such duties, the decision below threatens to convert every professional whose conduct touches a securities offering into a guarantor for the fidelity of every aspect of that undertaking.

A modern securities offering cannot be accomplished without the assistance of scores of professional services providers. Accountants, attorneys, bankers, brokers, engineers, financial printers, geologists, lenders, mortgage servicing companies, and other professionals are necessary parties. The participation of such professionals can range from pervasive assistance in crafting the offering to a mere pledge to be available for the provision of services in the future. The latter role, while minimal in character, is absolutely essential to the

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7 The "primary purpose of the Securities Exchange Act was to . . . provide fair and honest mechanisms for the pricing of securities [and] to assure that dealing in securities is fair and without undue preferences or advantages among the investors." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *see Securities Exchange Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) (purpose is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry").

8 As stated by President Roosevelt, "[t]he purpose of the legislation, I suggest, is to protect the public with the least possible interference to honest business." S. Rep. No. 47, 73rd Cong., 1st Sess. 6-7 (1933). Concern for the welfare of business pervades the legislative history of the 1934 Act. *See* Note, *The Recognition of Aiding and Abetting in the Federal Securities Laws*, 23 Houston L. Rev. 821, 832 n.58 (1986). For example, Congressman Wolverton stated that Congress understood "the necessity of taking every precaution to preclude even the possibility of curing one evil by creating another or greater one" in avoiding legislation that "would adversely affect the business enterprises of our nation." 78 Cong. Rec. 7863 (1934).

operation of the national securities marketplace. Without assurance that a professional services provider will be available to provide future financial reports or service a pool of mortgages, for example, an offering would be entirely ineffectual.

Although such assurances of future services have become a commercial necessity, the decision below threatens to make provision of such assurances practically impossible or prohibitively expensive. The decision permits a plaintiff to make conclusory securities fraud allegations -- based wholly on speculation and surmise -- on the basis of a professional's pledge to provide future services. The decision below imposes a duty of disclosure running from the professional to all potential investors, reasoning that the professional would not permit its name to be mentioned had it not assured itself of the material truth of *all* aspects of the offering, whether in its realm of expertise or not. *See Roberts*, 857 F.2d at 653 (Pet. 14a). Under the decision below, two likely outcomes exist. First, professionals retained to perform future services will decline to be listed in any offering memoranda, thus *diminishing* the flow of information to the investing public rather than maximizing it, contrary to the goal of the securities laws. *Cf. supra* note 7. Second, professionals retained to perform specific and limited services in the future would be forced to undertake a due diligence investigation of all aspects of the offering -- not merely their expertised portion -- before consenting to the use of their names. This expanded duty, clearly required under *Roberts*, would require tremendous duplication of effort among the many professionals who must provide services to accomplish a securities offering. Accountants, bankers, and mortgage servicing companies, among others, would all be required to perform identically pervasive investigations of all aspects of the offering before permitting their names to be used in association with it. The enormous cost of such investigations would add substantially to the cost of all securities offerings.

The scope of the duty created by the decision below can be best understood by comparing the duty it seeks to impose on Peat Marwick to the established duty the common law imposes on accountants. It is established that an accounting firm has a "narrow duty of disclosure," *Pegasus Fund, Inc. v. Laraneta*, 617 F.2d 1335, 1340 (9th Cir. 1980), under which it has "no duty to see to correction of portions of the prospectus other than the financial statement it prepared." *IIT, an Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 927 (2d Cir. 1980) (Friendly, J.). Even under more expansive theories of accountant duties to third parties, "the accountant does not become an insurer for every disappointed investor"[9] because an accountant's duties are limited to the application of accounting standards to the particular aspect of the offering for which the accountant was retained:[10]

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[9] Note, *Common Law Malpractice Liability of Accountants to Third Parties*, 44 Wash. & Lee L. Rev. 187, 209 (1987), *citing* American Institute of Certified Public Accountants, *Professional Standards* § 327.13 (1985). Even under those jurisdictions following the approach of the Restatement (Second) of Torts § 552 (1977), a professional only owes a duty of care to a third party if (1) the third party is among the limited class of people the professional intended to influence and (2) the type of transaction was such that the professional intended to influence third parties. Note, *supra*, at 190 n.16.

[10] An accountant does not guarantee that audited financial statements are correct, but assures investors that an audit conducted under generally accepted accounting principles and standards did not uncover any material errors. *See* American Institute of Certified Public Accountants, *Professional Standards* § 150 (1985); American Institute of Certified Public Accountants, *Auditing Standards* § 509.07 (1985). Although an independent accountant's function is to assure certainty in the investing process, *see United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984), an accountant's role is limited by the accountant's lack of control over the client's records and bookkeeping processes. *See* Gormley, *The Foreseen, The Foreseeable, and Beyond -- Accountants' Liability to Nonclients*, 14 Seton Hall L. Rev. 528, 553 (1984).

> It is not the law that whenever an accountant discovers that his client is in financial trouble he must blow the whistle on the client for the protection of investors -- so that [the defendant accounting firm] should have taken out an advertisement in the *Wall Street Journal* stating that [its client] was losing money, rather than waiting to report this in the next audit report. That would be an extreme theory of accountants' liability, and it is one we decline to embrace as an interpretation of the common law of Illinois . . .

Latigo Ventures v. Laventhol & Horwath, 876 F.2d 1322, 1327 (7th Cir. 1989). Even as a principal participant in the issuance of a prospectus under Section 11 of the Securities Act of 1933, an accountant would be responsible only for those portions of the prospectus subject to the accountant's expert review.[11] In stark contrast, under the decision below an accountant has a duty to investigate the material truth of all representations contained in an offering memorandum and, if any representation is materially false, has a further duty to inform the investing public of that falsity. *See Roberts*, 857 F.2d at 653 (Pet. 14a). Such a holding is tantamount to "implication of a duty to be one's brother's keeper, a duty unknown to common or federal securities law."[12] Such an advanced

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[11] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983) ("Accountants are liable under Section 11 only for those matters which purport to have been prepared or certified by them"). Under the plain language of Section 11, "every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement" is subject to suit "with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him[.]" 15 U.S.C. § 77k(a)(4) (1982).

[12] Branson, *Collateral Participant Liability Under the Securities Laws: Charting the Proper Course*, 65 Or. L. Rev. 327, 343 (1986); *see* Comment, *Lenders' Liability for Aiding and Abetting Rule 10b-5 Violations: The*

investigatory duty certainly has no place in federal securities law.

Contrary to decisions of this Court, the decision below implies an expansive duty directly from the securities laws rather than from a pre-existing independent duty owed by the accountant to the potential investor. This Court has insisted upon the presence of a duty independent of securities law before nondisclosure can constitute a violation of securities law. *See Chiarella v. United States*, 445 U.S. 222, 230 (1980) ("such liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction"); *Dirks v. Securities Exchange Comm'n*, 463 U.S. 646, 653-54 (1983) (a "duty arises from the relationship between the parties"); *see also Basic, Inc. v. Levinson*, 108 S. Ct. 978, 987 n.17 (1988). The decision below, in contrast, derives a duty to disclose from alleged knowledge of the fraud itself, regardless of any independent duty. *See Roberts*, 857 F.2d at 653 (Pet. 14a). This derivation of a duty from the very law allegedly violated produces a "circular" result:

> When the nature of the offense is a failure to "blow the whistle," the defendant must have a *duty* to blow the whistle. And this duty does not come from § 10(b) or rule 10b-5; if it did the inquiry would be circular. The duty must come from a fiduciary relation outside securities law.

Schlifke v. Seafirst Corp., 866 F.2d 935, 948 (7th Cir. 1989), *quoting Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495-96 (7th Cir. 1986) (emphasis in original) (Easterbrook, J.). The duty imposed by the decision below, then, has no rational basis and cannot form the basis for imposition of liability.

Knowledge Standard, 41 Sw. L.J. 925, 941 (1987) ("Such a rule of law could devastate the commercial banking industry").

The imposition of the *Roberts* duty of investigation and disclosure is inconsistent with business realities accompanying the valid workings of the national securities marketplace. Imposition of this unprecedented duty on professional services providers will require such professionals to be held for trial on the basis of no more than a bare allegation based wholly on the mere mention of a professional's name in conjunction with provision of future services. The Court has recognized that:

> [L]itigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general . . . even a complaint which by objective standards may have little chance of success at trial has a settlement value to the plaintiff out of proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739-40 (1975); *see* Fischel, *supra* note 5, at 102 ("[e]ven if such a claim cannot be proved at trial, it may have significant settlement value"). The expansive new duties created by the decision below breed vexatious litigation for professionals engaged in ordinary business activity, with all the expense and complexities concomitant to that litigation. This Court should preserve the effective functioning of the national securities market by reviewing the decision below and correcting its improper imposition of unprecedented new duties on professional services providers.

II. The Decision Below Conflicts With Decisions Of Other Circuits, Making National Securities Offerings Difficult As A Practical Matter

For the national market in securities offerings to function effectively, securities laws must be interpreted with a high degree of uniformity.[13] As the Court has recognized, the securities laws must be interpreted to remove uncertainties and not in an *ad hoc* manner. *See Pinter v. Dahl*, 108 S. Ct. 2063, 2081 (1988); *see also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 696 (1985). The decision below, and the Eleventh Circuit authority on which it relies, decimate a fragile uniformity that had developed among the lower courts concerning whether inaction can constitute "substantial assistance" to a primary securities violations without an independent pre-existing duty. The decision below creates a clear conflict between the Ninth and Eleventh Circuits and each other circuit considering the question, and even stands in conflict to the SEC itself. The Court should review the decision below to impose a uniform construction upon federal securities law and to protect those who participate in the

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[13] As commentators have pointed out, professionals participating in the securities market "must have some framework within which to pattern their actions. The theory of an effective marketplace assumes knowledge of the legal rules within which each individual must operate. A failure to define clearly these legal rules not only results in an inefficient marketplace but also allocates risks unfairly." Gilmore & McBride, *Liability of Financial Institutions for Aiding and Abetting Violations of Securities Laws*, 42 Wash. & Lee L. Rev. 811, 851 (1985). *See* A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud*, § 8.5(615) at 8:520 (1988); *see also* Comment, *Lenders' Liability for Aiding and Abetting Rule 10b-5 Violations: The Knowledge Standard*, 41 Sw. L.J. 925, 941 (1987); Comment, *Lender Liability for Securities Law Violations of its Borrowers*, 38 Okla. L. Rev. 133, 136-42 (1985); Note, *Liability for Aiding and Abetting Violations of Rule 10b-5: The Recklessness Standard in Civil Damage Actions*, 62 Tex. L. Rev. 1087 (1987); Dooley, *The Effects of Civil Liability on Investment Banking and the New Issues Market*, 58 Va. L. Rev. 776 (1972).

national securities market from being subject to fragmented and varying duties among the various circuits.

The clarity of the conflict between the decision below and established precedent can be illustrated by a brief survey of recent opinions of the circuits and the SEC:

- The First Circuit has found that evidence showing that certain individuals had allowed their names to be listed in an allegedly fraudulent offering memorandum was insufficient to impose aider and abettor liability. *See Cleary v. Perfectune, Inc.*, 700 F.2d 774, 779 (1st Cir. 1983).

- The Second Circuit has determined that inaction can give rise to aider and abettor liability "only when there is a conscious or reckless violation of an independent duty to act" and has held that an accountant "had no independent duty to see to the correction of portions of the prospectus other than the financial statement it prepared." *See IIT, an Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 927 (2d Cir. 1980).

- The Third Circuit has determined that the handling of stock purchases by brokers did not constitute "substantial assistance" of securities fraud even if the brokers had known that the purchases were effected to defraud third parties. *See Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 163 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

- The Fifth Circuit has recently held that no cause of action exists when a law firm acting as underwriters' counsel undertook a due diligence investigation, discovered fraud, and failed to disclose such fraud to investors. *See Abell v. Wright, Lindsey & Jennings*, 858 F.2d 1104 (5th Cir. 1988), *cert. denied in relevant part*, 109 S. Ct. 3242 (1989). The court also held that the law firm had not "assumed any duties to these bondholders merely by allowing its name to

be included in the final offering statement." *Id.* at 1122.[14]

- The Seventh Circuit has affirmed the dismissal of fraud claims against an accountant who not only lent his name to a memorandum but approved an allegedly fraudulent report. *See LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928, 932-33 (7th Cir. 1988); *see also Schlifke v. Seafirst Corp.*, 866 F.2d 935, 947-48 (7th Cir. 1989).

- The Eighth Circuit has found that the involvement of an attorney rendering opinions on the legality of alleged sales of securities was "only tangential" and insufficient to state a claim. *See Stokes v. Lokken*, 644 F.2d 779, 784 (8th Cir. 1981).

- The Eleventh Circuit has held that a lender could not be held liable as an aider and abettor based on its failure to disclose its knowledge that the issuer was financially unsound. *See Schneberger v. Wheeler*, 859 F.2d 1477, 1480-81 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2433 (1989). *But cf. Rudolph v. Arthur Anderson & Co.*, 800 F.2d 1040 (11th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) (discussed below).

- The District of Columbia Circuit has held that an accounting firm mentioned in investment solicitation materials could not be subject to liability. *See Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 35-36 (D.C. Cir. 1987).

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[14] The Fifth Circuit has also held that no cause of action exists for aiding and abetting when a bank loaned funds to allegedly defrauded investors and authorized use of the bank's loan documents in investor packages. *See Bane v. Sigmundr Exploration Corp.*, 848 F.2d 579, 582 (5th Cir. 1988). The court held that the evidence "will not support an inference" that the bank "sought to cloak the principal defendants in an aura of respectability or reliability and thereby rendered knowing substantial assistance to the principals." *Id.*

- The SEC has held that a law firm could not be liable as an aider and abettor even though it had actually discovered fraud but failed to correct public misconceptions concerning its client. *See In re William R. Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, 84,166 (SEC Feb. 28, 1981).

The confusion among the lower courts is further illustrated by the vacillation exhibited by the Eleventh and Ninth Circuits. In the decision below, the Ninth Circuit relied upon *Rudolph v. Arthur Anderson & Co.*, 800 F.2d 1040 (11th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), in which the court found that aiding and abetting liability could be premised on an accountant's failure to disclose alleged fraud when the accountant allegedly permitted a prior accurate audit to appear in a placement memorandum even though it knew or should have known the memorandum contained unrelated misrepresentations. *See id.* at 1044-46. Two years later, however, the Eleventh Circuit determined -- in an opinion that did not mention *Rudolph* -- that a lender could *not* be held liable as an aider and abetter of a securities violation even though bank officers actually testified that the bank (1) knew its financing program would make the investment more attractive; (2) possessed the issuer's financial statements and knew the issuer had a $14,000,000 working capital deficit; (3) knew that the issuer had been sued by an investor; and (4) had each specific investor sign a letter waiving any claims against the lender. *See Schneberger v. Wheeler*, 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2433 (1989). The rationale underlying the *Rudolph* decision and the *Schneberger* decision simply cannot be meshed. No doubt the Eleventh Circuit is in a state of internal conflict concerning the proper interpretation of "substantial assistance" in an implied action.

The Ninth Circuit is in no less a state of internal confusion. Although the decision below permits a finding of substantial assistance without a pre-existing independent duty to investigate and disclose, prior decisions of the Ninth Circuit permit no such liability. In *Strong v. France*, 474 F.2d 747 (9th Cir. 1973), and *Wessel v. Buhler*, 437 F.2d 279 (9th Cir. 1971), considerably greater conduct was undertaken by each professional services provider and no cause of action existed under either set of facts. In *Strong*, even though two defendants permitted their name and reputation to be used in solicitation of an offering -- and one defendant even confirmed the promoter's "unquestionable character and reliability" -- the Ninth Circuit found "no facts in this case which would impose any duty of disclosure." *Strong*, 474 F.2d at 752. In *Wessel*, an accountant took substantially more actions in support of an offering than did Peat Marwick in the case before the Court, yet the Ninth Circuit held that "there is not a scrap of authority supporting this extraordinary theory of Rule 10b-5 liability, and we will not supply any in this case." *Wessel*, 437 F.2d at 283. Indeed, the Ninth Circuit noted that "the exposure of independent accountants and others to such vistas of liability, limited only by the ingenuity of investors and their counsel, would lead to serious mischief." *Id.*

The "serious mischief" the Ninth Circuit predicted may be illustrated by the internally inconsistent adjudications within the decision below. First, a law firm that had actually performed past services was limited in its duty of disclosure to the narrow area of its expertise -- rendering title opinions. "Otherwise, a party could be liable for unlimited information even though it would be well beyond the matter for which it was retained." *Roberts*, 857 F.2d at 654 (Pet. 15a-16a). The decision below also affirmed, without any discussion, the district court's dismissal of technological consultants because the "mere provision of information" on which the allegedly fraudulent offering was based cannot support liability. *Roberts*, 670 F. Supp. at 1483. As to attorneys and consultants, the *Roberts*

duty appears to be limited to the area of expertise for which the professionals were retained. For accountants, however, the *Roberts* duty of investigation and public disclosure pervades every aspect of an offering. Such varying degrees of duty in a single opinion, without a word of discussion concerning why one professional merits a narrow duty and another professional merits a broad one, illustrates the unworkability of the *Roberts* analysis and underlines the importance of the Court accepting this case for review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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